

STATE OF MICHIGAN
IN THE SUPREME COURT

BARUCH SLS, INC.,

Petitioner-Appellant,

v

TOWNSHIP OF TITTABAWASSEE,

Respondent-Appellee.

Supreme Court Docket No. 152047

Court of Appeals Docket No. 319953

Michigan Tax Tribunal

Docket No. 0395010
0415093

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SUPPLEMENTAL BRIEF BY PETITIONER-APPELLANT

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LAW AND ARGUMENT

I. INTRODUCTION.

On April 1, 2016, this Honorable Supreme Court issued an order directing the scheduling of oral argument on the application for leave to appeal the April 21, 2015 judgment of the Court of Appeals and directing the parties to file supplemental briefs addressing the following questions:

- (1) whether *Wexford Medical Group v City of Cadillac*, 474 Mich 192; 713 NW2d 734 (2006), correctly held that an institution does not qualify as a "charitable institution" under MCL 211.70 or MCL 211.9 if it offers its charity on a "discriminatory basis";
- (2) if so, how "discriminatory basis" should be given proper meaning;
- (3) the extent to which the relationship between an institution's written policies and its actual distribution of charitable resources is relevant to that definition; and
- (4) whether, given the foregoing, the petitioner is entitled to a tax exemption.

Petitioner-Appellant Baruch SLS, Inc., now respectfully submits its supplemental brief to address the questions presented by the Court.

II. **WEXFORD CORRECTLY STATED THAT AN INSTITUTION DOES NOT QUALIFY AS A "CHARITABLE INSTITUTION" IF IT OFFERS ITS CHARITY ON A DISCRIMINATORY BASIS, BUT THE DISQUALIFYING DISCRIMINATION IS SUCH THAT EVIDENCES AN INTENT TO CONFER A PRIVATE AS OPPOSED TO PUBLIC BENEFIT.**

In the present case, the Court of Appeals applied *Wexford* to hold that Baruch did not discriminate in the provision of its charity to existing residents, whom as the Court of Appeals recognized, were admitted directly to Baruch's income based program. Unfortunately, and contrary to the record on appeal, the Court of Appeals mistakenly believed that Baruch treated

applicants differently from existing residents and held that this purported different treatment resulted in discrimination inconsistent with the operation of a charitable institution.

Instead, what ails petitioner is the stated scope of its charity care policy. Specifically, petitioner's charity care policy is not broadly defined as offering a reduced rate to all applicants unable to pay the standard market costs for this type of facility. Instead, petitioner's only stated charity care policy is the income based program, itself. ***But to be eligible for the program, one must first be a resident. And to be a resident, one must have the ability to pay at the outset. If not, petitioner will not accept the applicant. This means that in order to be eligible for the income based program, one must have been able to pay, at some point, more than what government assistance would offer. Indeed, petitioner has never admitted any resident who did not in the beginning have the ability to pay more than this.*** So while it is true that petitioner does not discriminate among its residents who are eligible for the income based program, entry into this charity is conditioned upon the Stone Crest residency requirements, which in turn, are conditioned on the ability to pay. This type of pay-to-play policy means petitioner does not "serve[] any person who needs the particular type of charity being offered." *Id.* at 215.

(Majority Opinion, p 5) (**Exhibit A** to Application) (Emphasis added).

This Court has requested supplemental briefing by the parties addressing the question of "whether *Wexford Medical Group v City of Cadillac*, 474 Mich 192 (2006), correctly held that an institution does not qualify as a 'charitable institution' under MCL 211.70 or MCL 211.9 if it offers its charity on a 'discriminatory basis.'" The narrow holding of *Wexford* was that petitioner qualified as a charitable institution following the Court's application of the factors which the Court distilled from its extensive analysis of its prior opinions.

In sum, the Tax Tribunal and Court of Appeals erred by denying petitioner's request for tax exemption as a charitable institution. Petitioner satisfies the concepts we have previously set forth with respect to what a claimant must show to be found "charitable." See *Retirement Homes, supra* at 348–349, 330 NW2d 682. Petitioner provides a gift—free or below-cost health care—to an indefinite number of people by relieving them of disease or suffering

Wexford, 474 Mich at 220-221.

The principle error committed by the Tax Tribunal was its development of a threshold requirement of charitable activity which was not provided for by legislature.

As such, while we will generally “defer to the Tax Tribunal's interpretation of a statute that it is delegated to administer,” *Maxitrol Co. v. Dep't of Treasury*, 217 Mich App 366, 370; 551 NW2d 471 (1996), we decline to do so in this case because we find that the tribunal misinterpreted the law. The statute says nothing about how much “charity” an institution should provide. Despite that, the tribunal erroneously engrafted a nonexistent threshold of charitable activity. Had the Legislature wanted such a threshold, it could have easily included one. Therefore, we find that petitioner is a charitable institution entitled to the corresponding tax exemption.

Wexford, 474 Mich at 221.

The foregoing summary of the present application and the holding of *Wexford* is provided in an effort to demonstrate how Baruch is endeavoring to fulfill its obligation to assist this Court and to follow this Court's direction to address the question presented. In light of the circumstances involved in the present matter as well as the circumstances involved in *Wexford* and this Court's holding, Baruch concludes that the Court's question is essentially whether a charitable institution must provide a benefit free of any charge to at least some recipients, or whether a charitable institution may remain such even though its charity is not completely free to anyone. For example, as applied to the circumstances in the present matter, even assuming contrary to the record presented that an applicant must pay something in order to become a resident and to be considered for admission to the income based program, does this fact amount to discrimination which disqualifies Baruch from being a charitable institution? Similarly, with respect to the circumstances in *Wexford*, the question asked by this Court is whether it was necessary for the petitioner to have provided free care to those who needed it, or could the petitioner have simply provided its charity at the reduced cost rates and nevertheless qualified as a charitable institution?

Wexford engaged in a thorough analysis of the prior pertinent case law. The topic of discrimination arose in the context of this Court's discussion of *Auditor General v R B Smith Mem Hosp Ass'n*, 293 Mich 36; 291 NW 213 (1940) where the Court expressed its approval of the following statement included in an ALR discussion:

“The determination of the exemption in a particular case seems to depend, in the last analysis, upon two things: First, whether the organization claiming the exemption is a charitable one; and, second, whether the property on which the exemption is claimed is being devoted to charitable purposes. In general, it may be said that any body not organized for profit, which has for its purpose the promotion of the general welfare of the public, extending its benefits without discrimination as to race, color, or creed, is a charitable or benevolent organization within the meaning of the tax exemption statutes. In determining whether the property is being devoted to charitable purposes within the meaning of the statute, the rule that tax exemptions are to be construed strictly is generally applied, with the result that, in the absence of a specific charter or statutory provision, no property owned by a charitable institution, but held as a source of income, can escape taxation, although the fact that a charge is made for benefits conferred, against those who are able to pay, in no way detracts from the charitable character of an organization.” [*Auditor General v R B Smith Mem Hosp Ass'n*, 293 Mich at 38–39; 291 NW 213 quoting 34 ALR 634, 635.]

Wexford, 474 Mich at 206-207.

The discrimination identified in the quotation from the ALR discussion is discrimination “as to race, color, or creed.” More importantly, the context of the statement makes it clear that the prohibited discrimination is such that conflicts with the promotion of the general welfare of the public, as the complete statement is that “any body not organized for profit, which has for its purpose the promotion of the general welfare of the public, extending its benefits without discrimination as to race, color, or creed, is a charitable or benevolent organization within the meaning of the tax exemption statutes.”

Similarly, as the Court in *Wexford* continued to review its prior decisions, it noted that in *Retirement Homes of the Detroit Annual Conference of the United Methodist Church, Inc, v Sylvan*

Twp, 416 Mich 340, 348–349; 330 NW2d 682 (1982), the Court had “noted the proposition pronounced in our past cases that ‘to qualify for a charitable or benevolent tax exemption, property must be used in such a way that it **‘benefit[s] the general public without restriction.’**” *Wexford*, 474 Mich at 211 (emphasis added). Indeed, inherent in the very concept of what constitutes “charity” is the notion that it is a gift for the benefit of an indefinite number of persons, i.e., a gift benefiting the general public without restriction. As *Wexford* observed, the circumstances in *Retirement Homes* involved no gift for the benefit of the general public without restriction or for the benefit of an indefinite number of individuals.

Surveying case law from other jurisdictions, we also took note of a widely used definition that seemed to restate and elaborate on that principle, and which similarly seemed to have stood the test of time:

“[Charity] * * * [is] a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government.” [*Retirement Homes*. 416 Mich at 348–349, 330 NW2d 682, quoting *Jackson v Phillips*, 96 Mass (14 Allen) 539 (1867) (emphasis deleted; alterations in original).]

As such, we framed the pertinent question as follows: “Does Retirement Homes operate the apartments in such a way that there is a ‘gift’ for the benefit of ‘the general public without restriction’ or ‘for the benefit of an indefinite number of persons’”? *Id.* at 349, 330 NW2d 682. In light of the particular facts of the case, we concluded in the negative and explained our reasoning as follows:

[T]here is no “gift” for the benefit of an indefinite number of persons or for the benefit of the general public without restriction in the operation of the apartments. The monthly fee is designed to cover all operating costs as well as to recover the construction costs of the apartments. While it does not appear that the apartments are operated for a profit, neither does it appear that the residents receive any

significant benefit that they do not pay for. There is no “gift” to the residents.

The operation of the apartments does not appear to benefit the general public. Its residents are chosen on the basis of their good health, their ability to pay the monthly charge, and, generally, their ability to live independently. [*Id.* at 349–350, 330 NW2d 682.]

Wexford, 474 Mich at 211-12.

Following its review of its prior cases, the Court distilled “several common threads” found in the cases.

First, it is clear that the institution's activities as a whole must be examined; it is improper to focus on one particular facet or activity. In that sense, the inquiry pertains more to whether an institution could be considered a “charitable” one, rather than whether the institution offers charity or performs charitable work. So it is the overall nature of the institution, as opposed to its specific activities, that should be evaluated.

A second indispensable principle is that the organization must offer its charitable deeds to benefit people who need the type of charity being offered. In a general sense, there can be no restrictions on those who are afforded the benefit of the institution's charitable deeds. This does not mean, however, that a charity has to serve every single person regardless of the type of charity offered or the type of charity sought. Rather, a charitable institution can exist to serve a particular group or type of person, but the charitable institution cannot discriminate within that group. The charitable institution's reach and preclusions must be gauged in terms of the type and scope of charity it offers.

From these precepts, it naturally follows that each case is unique and deserving of separate examination.

Wexford, 474 Mich at 212-213.

The Court determined that the definition of “charity” set forth in *Retirement Homes* “sufficiently encapsulates, without adding language to the statute, what a claimant must show to be granted a tax exemption as a charitable institution.” *Wexford*, 474 Mich at 214. The Court then

identified “certain factors” which “come into play when determining whether an institution is a ‘charitable institution’ under MCL 211.7o and MCL 211.9(a).”

Among them are the following:

- (1) A “charitable institution” must be a nonprofit institution.
- (2) A “charitable institution” is one that is organized chiefly, if not solely, for charity.
- (3) A “charitable institution” does not offer its charity on a discriminatory basis by choosing who, among the group it purports to serve, deserves the services. Rather, a “charitable institution” serves any person who needs the particular type of charity being offered.
- (4) A “charitable institution” brings people's minds or hearts under the influence of education or religion; relieves people's bodies from disease, suffering, or constraint; assists people to establish themselves for life; erects or maintains public buildings or works; or otherwise lessens the burdens of government.
- (5) A “charitable institution” can charge for its services as long as the charges are not more than what is needed for its successful maintenance.
- (6) A “charitable institution” need not meet any monetary threshold of charity to merit the charitable institution exemption; rather, if the overall nature of the institution is charitable, it is a “charitable institution” regardless of how much money it devotes to charitable activities in a particular year.

Wexford, 474 Mich at 215.

Baruch respectfully submits that the articulation of the discrimination factor in *Wexford* is correct. However, the articulation must be understood and applied in its proper context, which given the detailed and thorough analysis of the *Wexford* Court, is unquestionably aimed at the determination of whether the charity is afforded to the general public. Discrimination or restrictions limiting who may avail themselves of the charity are impermissible insofar as such restriction limits the provision of benefits to some group other than the general public.

Suppose, as a hypothetical matter, a charitable institution meeting all of the *Wexford* factors determined to provide food at 25% the actual cost of the food, believing that its charity assisted hungry families in meeting their nutritional needs as well as other advantages given the ability to spend money saved in food expense on other necessities such as clothing and shelter. All food provided was the result of gifts to the entity, and the entity distributed its food through the use of volunteers. Receipts for the food equaled the cost of maintaining the premises upon which food was distributed, and the entity sought exemption from tax on the property. Under the application of the *Wexford* discrimination factor as employed by the Court of Appeals in this matter, the organization would not qualify as a charity, because its charity required some payment, and there may be those in need of the charity who could not make the requisite payment. Yet, the charity is not restricted in any sense (race, creed or color) other than in an amount equal to 75% of the cost of the food. Clearly a gift is conferred to the recipient, and the organization otherwise meets the various factors. Baruch respectfully submits that the organization is a charitable institution providing a gift which benefits an indeterminate number of individuals,

Lastly, Baruch would respectfully direct the Court's attention to *Gull Lake Bible Conference Ass'n v Ross Tp*, 351 Mich 269; 88 NW2d 264, 266 (1958) where an exemption was sought for property used as a parking area, recreational area, fellowship center, and otherwise used in conjunction with fulfilling the purpose of the plaintiff organization which was "To promote and conduct gatherings at all seasons of the year for the study of the Bible and for inspirational and evangelistic addresses" The plaintiff charged for use of the property, and the Court adopting the opinion of the trial court ruled:

'In applying this rule we must determine whether the plaintiff holds the property in question as a source of income. It is true that the plaintiff receives income from the use which it makes of the property and the manner in which it occupies the property by reason of the

charges which it makes to the persons attending the conference and using the facilities offered and provided by plaintiff. However, in determining the true purpose of the plaintiff for owning and maintaining the property we must not overlook, but rather be largely governed by the purposes set forth in its Articles for its incorporation.

‘On reference thereto we find that it is not only the purpose of the plaintiff to conduct gatherings for the study of the Bible, etc., but it is also its purpose to promote such gatherings. Looking at the situation in the light of this latter purpose, it may be logically concluded that in order to obtain satisfactory attendance to its conference, plaintiff found it advisable and necessary to provide those attending with living accommodations, recreational facilities and all of the other services offered by plaintiff and made possible through the use and occupancy of the land in question by plaintiff in the manner in which they do use and occupy such land. The charges made for such services and facilities approximate the cost thereof to plaintiff, and the income derived therefrom should and does not, in the opinion of this Court, detract from the charitable character of the plaintiff organization.’

Gull Lake Bible Conference, 351 Mich at 274-275.

As with the hypothetical food charity, the Gull Lake Bible Conference charity conceivably was not available to all, since charges were made for use of the facilities, and it is conceivable that someone could desire or benefit from the charity but be unable to access it if unable to pay anything. That, however, was not the yardstick used by the Court. Rather, the Court found no discrimination as to race, creed or color.

The proofs show conclusively that it is not operated for profit. It has no stockholders. Aside from modest salaries paid to necessary employees, no individual receives any pecuniary benefit from its operation. ***It practices no discrimination as to race, creed or color.*** Having in mind the purpose for which it was formed as set forth in Article 2 of its Articles of Association, the conclusion is inescapable that it is a charitable organization and such is the decision of this Court.

Gull Lake Bible Conference, 351 Mich at 274.

In summary, while Baruch agrees that *Wexford's* statement concerning the discrimination factor is correct, the statement must be understood in its proper context: whether a benefit is extended to the general public.

III. WHILE WRITTEN POLICIES ARE RELEVANT AND TO BE CONSIDERED, THE ACTUAL PRACTICE OF THE ORGANIZATION IS DISPOSITIVE.

In considering whether an organization is a charitable institution, its actual practice is dispositive. Otherwise, an organization purporting to be a charitable institution would so qualify if its policies and procedures met the requirements, while in actual practice, those policies and procedures were not followed.

In 2002, the Court of Appeals decided *ProMed Healthcare v City of Kalamazoo*, 249 Mich App 490; 644 NW2d 47 (2002), affirming the denial of the exemption to a medical facility as not qualifying as a “charitable institution.” ProMed had the following policy, which it argued supported the exemption:

“ProMed’s activities are governed by a formal Charity Care Policy which requires ProMed to provide an appropriate level of charity care to residents of the community whose care is not fully covered under governmental or private payment programs and who are not otherwise able to pay fully for their care.”

ProMed Healthcare v City of Kalamazoo, 249 Mich App at 500.

The court concluded that this policy required ProMed to provide charitable care, but “ProMed failed to present to the Tax Tribunal any evidence that it complied with this internal charity policy.... In fact, it appears from the record that ProMed operates a fairly typical family practice, where patients are expected to pay for medical care received, either through private or governmental insurance programs. Although ProMed claims that it provides some medical care to indigent patients without charge, ProMed failed to provide any documentation regarding such

services.” *Id* (emphasis added). The court was concerned that allowing ProMed the exemption would open the door to granting tax-exempt status to “every organization offering health-related services, as long as those organizations are structure as nonprofit corporations and maintain policies of offering some ‘appropriate’ level of charity medical care to indigent persons.” *Id* at 501.

In the present case, the Court of Appeals correctly looked beyond Baruch’s written policies and sought to apply the legal standard to Baruch’s actual distribution of its charity. Baruch is entitled to the exemption.

Respectfully submitted,

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